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KIRKE LISI,  
Appellant,  
v.  
DEPARTMENT OF FISH AND WILDLIFE,  
Respondent.

)  
) Case No. DISM-01-0028  
)  
)  
) ORDER DENYING APPEAL ON REMAND  
)  
)  
)  
)  
)

1.1 This matter came before the Personnel Appeals Board, WALTER T. HUBBARD, Chair; GERALD L. MORGEN, Vice Chair; and RENÉ EWING, Member, on remand from Thurston County Superior Court, by order of Judge Daniel J. Berschauer dated August 16, 2002. The court remanded this matter to the Personnel Appeals Board without reversing the Board's previous decision affirming the disciplinary sanction of dismissal. The court ordered a review of the proportionality of the sanction of termination given past agency practices.

1.3 Appellant appealed the Board's decision to Thurston County Superior Court on January 30, 2002 pursuant to RCW 41.64.130. *Lisi v. Department of Fish & Wildlife*, Thurston County Cause No. 02-2-00193-6. Judge Berschauer entered an oral ruling remanding this matter to the Board on

1 July 12, 2002. The verbatim transcript of the oral ruling was appended and adopted by reference in  
2 the written order signed by Judge Berschauer on August 16, 2002. The court's order states:

3  
4 IT IS HEREBY ORDERED AND DECREED that the matter be remanded to  
5 the State of Washington Personnel Appeals Board for a review of the proportionality  
6 of sanction of termination given past Agency practices as consistent with the court's  
7 oral opinion, which is appended hereto and adopted by reference as if set forth in  
8 full. The Appellant shall be entitled to present evidence of past employment  
9 sanctions on the issue of proportionality of punishment. The Appellant shall be  
10 entitled to full discovery under the state rules for civil procedure.

11 1.4 On October 24, 2002, counsel for the respective parties participated in a telephonic  
12 scheduling conference with the Board's Executive Secretary to set the date for a hearing on remand  
13 and dates to complete discovery and exchange witness and exhibit lists. The pre-hearing schedule  
14 was confirmed by letter dated December 6, 2002, including discussion about the extent and scope of  
15 discovery to be conducted.

16 1.5 On January 27, 2003, the Board conducted a hearing for the purpose ordered by the court.

17 1.6 **Appearances.** Appellant Kirke Lisi was present and was represented by Daniel W.  
18 Wyckoff, Attorney at Law. Janetta E. Sheehan, Assistant Attorney General, represented  
19 Respondent Department of Fish and Wildlife (DFW).

20  
21 1.7 **Board Action.** The Board enters this order after consideration of the evidence presented  
22 and arguments advanced at the hearing on remand to affirm its previous decision to deny the appeal  
23 of Kirke Lisi.

## II. PRELIMINARY RULINGS

2.1 At the outset of the hearing, Respondent moved for an order limiting the presentation of any evidence related to sanctions imposed on other DFW law enforcement officers to those sanctions imposed prior to the action against the Appellant. Respondent argued that the court's order limited evidence to sanctions imposed prior to April 3, 2001, when Mr. Lisi's termination letter was issued. Appellant argued that the order is silent on the period for determining whether the sanction imposed on him was proportional. Appellant argued that through discovery he learned of four events that occurred prior to the incident for which he was dismissed. In those four cases no sanction had been imposed at the time of Appellant's dismissal so he should be allowed to present the lack of a decision as evidence on the issue of proportionality. Appellant also argued that his subpoena for Jeff Koenings, Director of the Department of Fish and Wildlife, to appear and give testimony at the hearing should be enforced. Appellant objected to the Director's offer to testify by telephone.

2.2 The Board granted Respondent's motion and ordered that evidence about sanctions imposed on other DFW law enforcement officers should be limited to conduct that occurred prior to April 3, 2001 and actions or sanctions imposed for that conduct. The Board further ordered that Director Koenings should appear, in person, not later than 3:45 PM to give testimony in the matter before the Board.

2.3 The Board further ordered that this matter is subject to a protective order consistent with the court's oral ruling. The names of current or former law enforcement officers who are not parties to this appeal are not to be disclosed outside of references to such officers during the hearing.

### III. FINDINGS ON REMAND

3.1 Bruce Bjork is Chief of the Enforcement Division for the Department of Fish and Wildlife. Chief Bjork is the appointing authority for Enforcement Division employees. He became appointing authority in October 1998. Chief Bjork did not consider sanctions imposed on other law enforcement officers when he decided to dismiss Kirke Lisi.

3.2 Chief Bjork had knowledge of the following disciplinary and corrective actions involving other law enforcement officers at the time he decided to dismiss Kirke Lisi:

- Captain MS was investigated for improper use of state computers for allegedly visiting pornographic web sites. The allegation was unfounded. No criminal charges were involved.
- Officer BC was on the hunting trip with Mr. Lisi. However the disciplinary sanction of demotion was imposed after Mr. Lisi was dismissed. No criminal charges against Officer BC were involved.
- Officer L1 made a mistake in recording hours worked on his time sheet. Chief Bjork did not recall the exact date the incident occurred. The officer was not fired and no criminal charges were involved.
- Officer George Maddox was a Fish & Wildlife Officer 2 who failed to renew his U.S. Coast Guard boat operator's license, but informed the agency that he had a valid license. He was promoted to F&W Officer 3 based on having a current boat operator's license. Maddox was demoted to a customer service position for falsifying the expiration date on his license and for failing to be truthful. This incident did not involve criminal charges. On appeal, the PAB affirmed the demotion.
- Officer Dennis Whiteman was dismissed in 1996 for allegedly cashing a reward check made out to another person. Chief Bjork was not the appointing authority at the time. Officer Whiteman appealed and was reinstated by the PAB. Chief Bjork was the appointing authority when that reinstatement occurred.

[Note: Notwithstanding the protective order in effect, the names of these officers and the Board's decisions are matters of public record. Maddox v. Department of Fish and Wildlife, PAB No. DEMO-00-0012 (2001); Whiteman v. Department of Fish and Wildlife, PAB No. DISM-96-0045 (1997).]

- 1 • Officer L2 engaged in two incidents of misconduct:
  - 2 1) He recorded citations in his activity log book that he never filled out or filed with the court. He received a suspension for 15 days.
  - 3 2) He attended a blood alcohol (BAC) training course to renew his certification for operating BAC testing devices. He was in uniform and driving a state vehicle to the training. The trainer detected intoxicants on Officer L2's breath. At Chief Bjork's direction, a breath test was administered using a portable breath testing device. Chief Bjork was not certain, but recalled that the test was under the legal limit. Officer L2 was suspended and issued a "last chance" agreement under which he would be terminated for any further violations of the merit system rules or agency rules and policies. The officer was also directed to attend substance abuse treatment. No driving under the influence of intoxicants (DUI) or other criminal charges were involved.
- 9 • Sergeant RW was the subject of a subordinate's complaint for raising his voice during a discussion. During the investigation of that incident, evidence was discovered of potentially improper per diem reimbursement. Chief Bjork could not recall if the incident occurred prior to or after April 2001. Most of the allegations of misconduct were not sustained. A corrective action memo was issued about the officer's computation of per diem. No criminal charges were involved.
- 13 • Officer W was given a corrective action memo regarding the manner in which he computed his eligibility for per diem reimbursement. Criminal charges were not involved and there was no evidence that he engaged in theft.
- 15 • Sergeant SD made gender and race based comments during an officers' meeting. He was issued a written reprimand. No criminal charges were involved.
- 17 • Captain DS parked his car beyond a "closed parking" sign in a hunting area. Chief Bjork was not aware that Captain DS was cited for any law violation. Chief Bjork recalled Captain DS was issued a corrective action or a reprimand.
- 19 • Officer RP was a master instructor that Chief Bjork disciplined for using a state vehicle for private purposes. No criminal charges were involved.
- 21 • Sergeant BY was transferred by headquarters to a line position at approximately the time Chief Bjork became employed by DFW. Chief Bjork was aware that sexual harassment charges were at issue, however the incident occurred prior to the chief's employment.
- 23 • Sergeant F was found by the court to have violated the constitutional rights of an officer in violation of the State Employee Whistleblower Protection Act. A judgment was entered against the agency for \$360,000. Chief Bjork took no disciplinary action against Sergeant F. No criminal charges were involved.
- 25 • Officer TJ informed Chief Bjork that he had been stopped and arrested for DUI while he was attending the F&W basic law enforcement academy and that he had

1           been terminated, later rehired by the department. The incident with Officer TJ  
2           occurred prior to the time the chief became employed by DFW.

- 3           • Wildlife area manager MM was cited for shooting a wrong sex deer. This case  
4           dates back to 1980 and formal disciplinary action was taken. The sanction  
5           imposed was a 15-day suspension, and MM was restricted from performing  
6           enforcement duties for two years. Chief Bjork has no direct or personal  
7           knowledge of the incident, but he is aware that the officer is still employed and  
8           holds a commission with DFW.
- 9           • Officer MS was on a hunting trip when he shot a doe deer during a bucks only  
10          season. He immediately reported the incident to his supervisor. The matter was  
11          investigated criminally, but the prosecutor declined to file charges. The officer  
12          received a corrective action memo and was ordered to attend an advanced hunter  
13          education course.

14       3.3     Dr. Jeff Koenings is the Director of the Department of Fish and Wildlife. Dr. Koenings  
15       takes policy direction from the Fish and Wildlife Commission and has been delegated decision-  
16       making authority for administration of the agency. Dr. Koenings, in turn, has delegated appointing  
17       authority to others, including Chief Bjork. Dr. Koenings does not usually have direct involvement  
18       in the disciplinary process of employees.

19       3.4     Dr. Koenings testified that the agency has not adopted a policy on proportional sanctions for  
20       similar events. However, his philosophy is that the disciplinary process should ensure fairness, both  
21       in investigation and the sanction imposed. Dr. Koenings, however, is not aware of any two cases  
22       that involve identical or comparable fact patterns. Dr. Koenings believes that an employee should  
23       reasonably expect that discipline will be meted out in a proportional manner. However, he also  
24       believes that making a finding of misconduct and imposing a sanction extends beyond a review of  
25       only the alleged misconduct. He believes that a number of other factors must be weighed, including  
26       a case-by-case and objective review of the facts, an evaluation of the seriousness of the offenses, as  
27       well as weighing what transpired during the investigation and Loudermill hearing. He also testified

1 that if two cases involved an identical fact pattern, then the same action should be taken against the  
2 employees.

#### 3 **IV. CONCLUSIONS ON REMAND**

4 4.1 Appellant contends that the discipline imposed on him is disproportionate when compared to  
5 the discipline imposed on other law enforcements officers in the Department of Fish and Wildlife.  
6 The court remanded this matter to the Board for a review of the proportionality of the sanction of  
7 dismissal given past agency practices. The evidence presented during the hearing is summarized  
8 above as the Board's findings on remand. Appellant produced only one example of a law  
9 enforcement officer who was cited for a game law violation, and that incident occurred more than  
10 20 years ago. The only other instance of an alleged game law violation was investigated and no  
11 criminal charges were filed. In each of the other instances of misconduct related by Chief Bjork, no  
12 criminal charges were involved. Appellant did not produce any evidence in addition to Chief  
13 Bjork's testimony to support his contention that dismissal from employment was a disproportionate  
14 sanction.

15  
16 4.2 The Board's evaluation of whether a sanction imposed is appropriate has always depended  
17 on due consideration of the facts and circumstances of the appeal, including the seriousness and  
18 circumstances of the offenses. The penalty or sanction imposed by the appointing authority should  
19 not be disturbed unless it is too severe. The sanction imposed should be sufficient to prevent  
20 recurrence, to deter others from similar misconduct, and to maintain the integrity of the program.  
21 Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

22  
23 4.3 During hearings before the Board, employees may raise any claim or defense including  
24 evidence of disparate discipline of employees who engaged in the same misconduct. In a recent  
25 decision, the Board again stated:

1 This Board's practice has been to review each disciplinary appeal before it based on  
2 the facts and merits of that individual case, including the employment history of the  
3 employee, the existence of progressive discipline and the seriousness of the  
4 misconduct. The review that Appellant asks us to make requires that we examine an  
5 unrelated incident of alleged misconduct where we have limited and insufficient  
6 information before us to make a finding of misconduct and to then evaluate whether  
7 the level of discipline was appropriate on a matter over which we have no  
8 jurisdiction.

9 McGraw v. Dep't. of Licensing, PAB No. DISM-01-0084 (2002).

10 4.4 Even though the Board is often invited to consider evidence of misconduct by other  
11 employees to demonstrate disparate treatment or disproportionate disciplinary sanctions, the Board  
12 finds such evidence has limited value in evaluating whether the sanction under appeal is  
13 appropriate. The examples of disparate treatment rarely have identical facts to the appeal under  
14 consideration. Also, the facts of other actions or the lack of disciplinary action are not fully before  
15 the Board to make a meaningful comparison. The Board relies on its experience of conducting  
16 hearings and deciding appeals within its jurisdiction from across the broad spectrum of state  
17 agencies and institutions of higher education to guard against disparate treatment and  
18 disproportionate disciplinary sanctions. Such an approach reinforces the principle that each appeal  
19 is decided on its unique facts and circumstances, with the Board cognizant of its past decisions. To  
20 expand the scope of our review to include an examination of all similar instances of employee  
21 misconduct and discipline, we believe, would make hearings and decisions more lengthy and  
22 complex without significantly increasing the scrutiny given to disciplinary actions.

23 4.5 The Board concludes that the Department of Fish and Wildlife has not imposed  
24 disproportionate disciplinary sanctions on law enforcement officers who have violated the law. The  
25 disciplinary sanction of dismissal was appropriate under the circumstances present here. Appellant  
26 not only violated the game laws of another state, but he was untruthful during the investigation of  
those violations. The Appointing Authority's decision to dismiss Appellant was not too severe.

1 Dismissal will prevent Appellant from engaging in such conduct while employed as a law  
2 enforcement officer, deter other law enforcement officers from engaging in similar misconduct, and  
3 will maintain the integrity of the Department's law enforcement program.  
4

5 4.3 Based on the foregoing findings and conclusions, the appeal of Kirke Lisi should be denied.  
6

7 Having reviewed the files and records in this matter and being fully advised in the premises, the  
8 Board enters the following:

9 **V. ORDER**

10 NOW, THEREFORE, IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law  
11 and Order entered on January 7, 2002 is affirmed and the appeal of Kirke Lisi is denied.

12 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2003.  
13

14 WASHINGTON STATE PERSONNEL APPEALS BOARD

15 \_\_\_\_\_  
16 Walter T. Hubbard, Chair

17 \_\_\_\_\_  
18 Gerald L. Morgen, Vice Chair

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20 René Ewing, Member  
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